COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 1572-CV-00335

CHRISTOPHER KANAGA and
LARAJA AND KANAGA, P.C.,

Plaintiffs,

v.

SHELDON MANUEL,

Defendant.

PLAINTIFFS' CONSOLIDATED REPLY BRIEF IN SUPPORT OF THEIR MOTIONS *IN LIMINE* (1) THAT DEFENDANT'S DEFAMATORY STATEMENTS ARE DEFAMATORY PER SE AND (2) ESTABLISHING THAT DEFENDANT'S DEFAMATORY STATEMENTS ARE NOT PROTECTED OPINION

In response to Plaintiffs' motion *in limine* for a pre-trial order establishing that: (1) that the three false statements published by Defendant Sheldon Manuel are defamatory per se, as a matter of law, and (2) are not protected opinion, as a matter of law, but rather assertions of purported fact, objectively verifiable as true or false, Defendant ("Manuel") has filed, in violation of Superior Court Rule 9A and this Court's pre-trial orders, untimely opposition briefs that mis-cite and mis-apply the controlling law. As discussed below, these two-page opposition briefs only serve no underscore the appropriateness of the Plaintiffs' motions in limine.

As a threshold matter, Defendants' opposition briefs are untimely and violate both the letter and the spirit of Superior Court Rule 9A and this Court's pre-trial orders. This is a case which has already been ordered to trial twice. The parties submitted their joint pre-trial memorandum close to a year ago on February 20, 2018. On February 23, 2018, the Court then ordered the case to trial beginning on August 6, 2018. The trial was then continued and re-scheduled for February 11, 2019. In connection with the revised Final Pre-Trial Order dated

September 13, 2018, Superior Court Rule 6, and Superior Court Standing Order 1-88, the parties were ordered to file no later than 5 business days before trial, among other things, all motions in limine, oppositions thereto, and reply briefs in compliance with Superior Court Rule 9A. To ensure that Defendant had sufficient time to oppose Plaintiffs' motions in limine and to ensure that Plaintiffs had sufficient time to prepare any necessary reply briefs, Plaintiffs served their motions in limine on January 3, 2019 - - over a month before trial. The deadline for responding to these motions were January 17, 2019.

Despite Manuel's counsel communicating with Plaintiffs' counsel on numerous matters in the weeks before the deadline, counsel never requested an extension or accommodation until the week before trial. In preparing for trial and assisting the Court efficiently address pre-trial issues, Plaintiffs are entitled to rely on, and expect that other litigants will be held to, the Court's rules and orders. Manuel's oppositions are late and need not be considered by this Court.

Second, Manuel ignores the controlling law in her opposition briefs that whether a statement is defamatory per se and/or a protected statement of opinion is a question of law for the Court. See Foley v. Lowell Sun Publishing Co., 404 Mass. 9, 11 (1989) ("in a defamation action a threshold issue is whether the statement is reasonably susceptible of a defamatory meaning, and that determination is a question of law for [this] court") (emphasis added); Jones v. Taibbi, 400 Mass. 786, 791 (1987); Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 309 (1982) ("The determination whether a statement is one of fact or opinion is generally considered a question of law"). As a result, the Plaintiffs' motions in limine present clear legal issues for this Court, the determination of which will streamline the trial in this matter. The Court need only apply the law to Manuel's actual statements to readily determine that they are statements of verifiable fact and defamatory per se, as a matter of law.

> I have suffered death threats, break-ins, tappings (sic), postal fraud, hackings and character-demolishing attacks in court, as attempts were made by the cult lawyer, Chris Kanaga, to pay off my own lawyers and judges!! Even law enforcement were targeted by them as one of the officer from Cohasset on Boston's south Shore has admitted.

Exhibit A (emphasis added).[1]

On the issue of whether words are defamatory per se, the legal standard is clear. As the SJC has instructed:

> If a publication is susceptible of both defamatory and harmless meanings, it presents a question for the trier of fact and cannot be ruled non-libellous as matter of law.... Inferences which might be drawn by a considerable and respectable segment of the community can make a publication actionable....

King v. Globe Newspaper Co., 400 Mass. 705, 718 (1987) (emphasis added). As a matter of law, statements that charge the plaintiff with a crime or statements that may prejudice the plaintiff's profession or business are defamatory per se. See Phelan v. May Dept. Stores Co., 443 Mass. 52, 56 (2004) (the imputation of a crime is defamatory per se and its determination is one for the court). Here, Manuel's statements on their face assert that Mr. Kanaga and his law firm have attempted to "pay off" lawyers, judges, and members of law enforcement, making those statements defamatory per se.

Tellingly, Manuel does not even attempt to explain what possible "harmless" interpretation could reasonably be inferred from those words. That is because there are none. Rather, she resorts to misrepresenting to this Court, relying on Forbush v. City of Lynn, 35 Mass. App. Ct. 696 (1994), that

> [I]n order to make an unequivocal determination that an alleged statement is defamatory per se, there must be some showing of recklessness that

[1] Three (3) statements from this posting constitute the heart of the trial in this matter; specifically the Defendant's assertion, as a matter of purported "fact" that Attorney Kanaga:[1] attempted to pay off Ms. Manuel's own lawyers; [2] attempted to pay off judges; and [3] attempted to pay off members of law enforcement, including a police officer from Cohasset.

rises to the level of tortious conduct allowing a Court to make the determination of a per se act.

(Def.'s Opp. to Motion In Limine on Defamation at p.1) (emphasis added). Not only does this statement bear no resemblance to the law governing defamation, Manuel's reliance on Forbush is, at best, perplexing and, at worst, violative of Rule 11.

Indeed, Forbush did not even involve a claim for defamation whatsoever. Rather, it involved an action brought against municipality which owned and operated playground where the plaintiff alleged that a child was seriously injured while playing on playground as a result of municipality's willful, wanton or reckless conduct. The Appeals Court reversed summary judgment, holding that the Massachusetts Tort Claims Act exemption for intentional torts did not provide municipality with immunity from liability in action brought under recreational use statute alleging that child was seriously injured while playing on public playground as a result of municipality's willful, wanton or reckless conduct. Id. at 701-702.[2]

It appears that having no legal authority nor any argument to rebut the unassailable fact that her statements are defamatory, as a matter of law, Manuel has resorted to citing grossly inapplicable cases simply to have citations. Consequently, the Court should grant Plaintiffs' motion in limine and rule that Manuel's three statements are defamatory, as a matter of law.

Similarly, the Court can readily rule that Manuel's three statements are not protected opinion, but objectively verifiable fact because whether a statement is a factual assertion or an opinion is a question of law for the Court. See Scholz, 473 Mass. at 250; Reilly, 59 Mass. App. Ct. at 769-770. "In stark contrast to statements of opinion, statements that present or imply the existence of facts that can be proven true or false are actionable." Van Liew v. Eliopoulos, 92 Mass. App. Ct. 114, 126 (2017) (emphasis added) (affirming $2.9 million defamation judgment

[2] Manuel has also cited Millenium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627 (2010), which also has nothing to do with defamation law. Mahlowitz involved an abuse of process action against an attorney who represented member's wife in underlying divorce action.

based on assertions of unethical political conduct); Downey v. Chutehall Const. Co., 86 Mass. App. Ct. 660, 664 (2014) (reversing summary judgment; "The defamatory statement on its face appear directly and definitively factual....[It] could be verified as either true or false.").

Here, there is no doubt that Ms. Manuel's statements were assertions of fact and not Constitutionally protected opinion because the three (3) statements at issue are objectively verifiable as either true or false through evidence. Either Mr. Kanaga attempted to pay off Ms. Manuel's lawyers, or he did not. Either Mr. Kanaga attempted to pay off judges or members of law enforcement or he did not. Either an "officer from Cohasset on Boston's south Shore has admitted" that Mr. Kanaga attempted to bribe members of law enforcement, or that was a fabrication. See Reilly, ("Allegations such as that Reilly played golf and lied about it . . . are factual and therefore capable of being proved false" and "Palermo's statement that Zeke's records were altered to make Reilly's work look more thorough is factual and therefore capable of being proved false: either a document shows signs of alteration or it does not"); Tech Plus, Inc. v. Ansel, 59 Mass. App. Ct. 12, 22 (2003) (reversing summary judgment; "An allegation that a supervisor has harassed or otherwise discriminated against an employee in his or her employment, however, can be proved false"); Elder v. Cardoso, 421 S.E.2d 753 (Ga. App. Ct. 1992) (in action for slander, doctor "either did or did not attend deliveries" or "was or was not available when babies were sick"; such statements are capable of being proved true or false).

Indeed, in stark contrast to conveying any subjective opinion, Ms. Manuel attempted to create the appearance of factual support for her assertions by contending, falsely, that "[e]ven law enforcement were targeted by them as one of the officers from Cohasset on Boston's south Shore has admitted." By falsely informing readers that a police officer from Cohasset had "admitted" that Mr. Kanaga had attempted to pay off law enforcement, Ms. Manuel was clearly

and unmistakably telling readers that she had, in fact, factual support for her assertions, which were themselves objectively verifiable.

Put simply, Ms. Manuel's false assertions that Mr. Kanaga attempted to "pay off" her own lawyers, pay off judges, and pay off members of law enforcement are clear and unambiguous assertions of fact - - not opinion - - which can, and will be, proven false. As a result, the Plaintiffs respectfully request a pre-trial order establishing the above three (3) statements are not Constitutionally protected opinion and are defamatory per se.

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I hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail/electronic on 2/4/19